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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER,

Petitioner,

vs.

JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND AND BRIEF IN SUPPORT THEREOF.

LEONARD WEINBERG,
J. PAUL SCHMIDT,
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JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Your Petitioner, David Fisher, respectfully shows:

The purpose of this petition is to request this Court to review and reverse the judgment and decree of the Court of Appeals of Maryland, the Court of last resort of the State of Maryland in which a judgment entered by the Baltimore City Court on June 14, 1944, in favor of Jack L. Medwedeff, trustee in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, against the bankrupt, David Fisher, in the amount of $39,760.10, was affirmed.

The suit was originally instituted in the Baltimore City Court, by the filing of a declaration, at law, on June 8, 1943, by the said Jack L. Medwedeff, as trustee appointed by the District Court of the United States for the District of Maryland, in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, in an action ex contractu, based upon a certified copy of an Order of W. Ainsworth Parker, Referee in Bankruptcy, dated April 15, 1940, directing the bankrupt, David Fisher, the petitioner herein, to turn over to the said Jack L. Medwedeff, Trustee in Bankruptcy, on or before May 15, 1940, the sum of $32,073.10 in cash or merchandise, which order, usually referred to in bankruptcy proceedings as a "turn-over order", was affirmed June 13, 1940, by the District Court of the United States for the District of Maryland in Bankruptcy.

The declaration quoted the order of the Referee in Bankruptcy of the District Court of the United States, and the order affirming the same, alleged that the time for appeal had passed, that said order has not been complied with, that no part of the sum of $32,073.10 has been paid to the plaintiff, that on August 1, 1940, the bankrupt was found by the District Court of the United States for the District of Maryland, In Bankruptcy, to have dissipated said funds and merchandise, that the defendant was discharged from pending contempt proceedings for non-compliance with said order, and that the defendant is indebted to the plaintiff under said order for the sum of $32,073.10 with interest from June 13, 1940. A copy of the order of the District Court of the United States for the District of Maryland, certified by the Clerk of that Court to be "a true copy of the Order of Court affirming turn-over Order of Referee dated April 15, 1930" was filed with the declaration (Rec. pp. 1-3).

The petitioner herein, as defendant in the proceedings, filed a demurrer to the declaration, and stated the grounds to be:

"1. That the said declaration is bad in substance and insufficient in law.

"2. That the turn-over order of the United States District Court for the District of Maryland in Bankruptcy, dated June 13, 1940, does not establish a cause of action upon which the Trustee in Bankruptcy can sue the bankrupt in a State Court or in any other Court.

"3. That the cause or causes of action on the claims of the creditors whom the Trustee in Bankruptcy represents are vested in the creditors alone for which suits may be instituted in their name and not by the Trustee in Bankruptcy allegedly for their benefit.

"4. And for other reasons to be shown at the hearing of this demurrer." (Rec. pp. 4-5.)

This demurrer was overruled, with leave to plead. Within the time limited the defendant filed the following pleas:

"1. That he never promised as alleged.

"2. That he never was indebted as alleged.

"3. That the alleged cause of action did not accrue within three years before the filing of the declaration in this case.

"4. That the alleged order of the District Court of the United States for the District of Maryland dated June 13, 1940, does not constitute a cause of action upon which the Trustee in Bankruptcy can bring suit.

"5. That the United States Bankruptcy Statutes do not give the Trustee in Bankruptcy a right of action against the bankrupt to recover assets which the bankrupt is alleged to have failed to deliver to the Trustee.

"6. That the alleged order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the Order of the Referee in Bankruptcy dated May 15, 1940, is a mere administrative directive order and does not constitute a judgment or decree of the said Referee or of the District Court of the United States for the District of Maryland.

"7. That the alleged claim upon which this suit is brought is vested in the creditors of the said David Fisher who may pursue the remedies afforded them by law.

"8. That certain of the creditors of said David Fisher whom the plaintiff trustee in bankruptcy represents as such trustee have reduced their claims to judgment and this suit, therefore, constitutes a duplication of actions for the same debt or debts." (Rec. pp. 9-10.)

The plaintiff demanded the particulars of the defendant's first and second pleas and the nature of the evidence to be offered in support thereof. In answer thereto the defendant filed the following particulars:

"That at the trial of the case an affirmative defense will be presented under said pleas and the precise nature of the evidence to be offered in support thereof will be that the plaintiff has no right of action against this defendant;

"That the order of the District Court of the United States for the District of Maryland dated June 13, 1940, does not constitute a cause of action upon which the Trustee in Bankruptcy can bring suit; that the United States Bankruptcy Statutes do not give the Trustee in Bankruptcy a right of

action against the bankrupt to recover assets which the bankrupt is alleged to have failed to deliver to the Trustee; that the alleged order of the District Court of the United States for the District of Maryland, dated June 13, 1940, affirming the order of the Referee in Bankruptcy dated May 15, 1940, is a mere administrative directive order and does not constitute a judgment or decree of the said referee or of the District Court of the United States for the District of Maryland;

"That the alleged claim upon which this suit is brought is vested in the creditors of the defendant who may pursue the remedies afforded them by law;

"That certain of the creditors of the said defendant have reduced their claims to judgment and this suit constitutes a duplication of actions for the same debt or debts;

"That the alleged order of the District Court of the United States for the District of Maryland, dated June 15, 1940, is inadmissible in evidence as a judgment or decree of a court of competent jurisdiction;

"That the alleged order of the District Court of the United States for the District of Maryland, dated June 13, 1940, does not constitute a contractual obligation upon which a suit in contract may be brought; and that the defendant herein is not indebted in any manner contractually or otherwise to the plaintiff." (Rec. pp. 11-12.)

The plaintiff demurred to all eight of the above pleas, which demurrer was sustained by the Court with leave to the defendant to plead further.

Within the time limited the defendant filed two additional pleas numbered 9 and 10, as follows:

"9. That if the order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the order of the Referee in Bankruptcy dated

May 15, 1940, is a judgment or decree of the said District Court of the United States for the District of Maryland, no suit upon said judgment or decree is required to constitute the same a lien in any jurisdiction within the State of Maryland because any judgment or decree of the District Court of the United States for the District of Maryland properly certified may be recorded in any jurisdiction of the State of Maryland, and thereby said judgment or decree will have the same lien upon property of any judgment debtor and be subject to the same rights of enforcement thereof as any judgment or decree entered in the State Court;

"10. That the order of the District Court of the United States for the District of Maryland dated June 13, 1940, affirming the order of the Referee in Bankruptcy, dated May 15, 1940, is not a judgment or decree of another State upon which suit may be brought in the State of Maryland in the same manner as a judgment or decree of any other State of the United States." (Rec. p. 13.)

The plaintiff demurred to the additional pleas Nos. 9 and 10, and the Court sustained the demurrer with leave to amend or plead further. The defendant declined to plead further or amend, and on June 14, 1944, the Baltimore City Court entered judgment by default against the defendant in the proceedings, the petitioner here, and assessed damages in favor of the plaintiff in the proceedings for $39,760.10 and costs of suit. (Rec. pp. 15-16.)

From this judgment an appeal was prosecuted by the defendant in the proceedings, petitioner here, to the Court of Appeals of Maryland, and by decision and judgment of that Court, which became final on January 19, 1945, the judgment of the Baltimore City Court was affirmed, costs to be paid by the petitioner here. (Rec. pp. 17-21.)

Jurisdictional Statement

The basis of jurisdiction of the Supreme Court of the United States in this case is that there is involved a Federal Statute, the provisions of the Federal Bankruptcy Act.

The statutory provision which sustains the above jurisdiction is:

Judicial Code Sec. 237 (28 U. S. C. 344).
Rector v. *City Deposit Bank Co.*, 200 U. S. 51; 51 L. Ed. 596; 27 Su. Ct. R. 294.

The statute here involved is the Federal Bankruptcy Act, and particularly sections 46, 96, 107 and 110 directly and incidentally, sections 2 and 14.

The Judgment to Be Reviewed

The judgment of the Court of Appeals of Maryland, which became final on January 19, 1945, in which it was held that under the provisions of the Federal Bankruptcy Act, a trustee in bankruptcy may sue the bankrupt for whose estate he is acting, upon a turnover order of the bankruptcy Court and obtain money judgment against the bankrupt.

The nature of the case was a suit at law in a State Court by a trustee in bankruptcy against the bankrupt for whose estate he was acting, upon a certified copy of a turnover order of the Bankruptcy Court. Judgment was entered for the plaintiff against the defendant and on appeal the judgment was affirmed. The defendant, bankrupt, requests review of the decision.

The grounds upon which it is contended the questions involved are substantiated are:

(1) Does the Federal Bankruptcy Act give to the trustee in bankruptcy appointed under the provisions of said Act

a right or power to sue the bankrupt, for whose bankrupt estate such trustee is acting, upon a turnover order of the Bankruptcy Court appointing such trustee, directing the bankrupt to turn over to the trustee a sum of money in cash or merchandise, and recover a money judgment against the bankrupt?

(2) Is a turnover order of a Bankruptcy Court, as referred to in the aforegoing paragraph (1), a judgment or decree of such Court?

(3) Does a turnover order of a Bankruptcy Court, as referred to in the aforegoing paragraph (1), create any contractual obligation of the bankrupt to the trustee in bankruptcy, upon which suit can be brought in a State Court?

The stage in the proceedings in the court of first instance, in which the federal question herein sought to be reviewed was raised, was in the demurrer of the defendant in said proceedings, the petitioner here, to the declaration of the trustee in bankruptcy, by which demurrer the defendant in the proceedings, petitioner here, challenged the right and power of a trustee in bankruptcy under the Federal Bankruptcy Act to sue the bankrupt for whose estate he was acting as trustee on a turnover order and contended that section 46 of the bankruptcy act did not give any such power and right to the trustee in bankruptcy. This question was again raised in the pleas to the declaration, and in addition thereto the defendant in the proceedings, petitioner here, claimed that a turnover order of a bankruptcy court in pursuance of the powers granted to the bankruptcy courts, was not a judgment or decree of such courts upon which suit could be brought in another Court, either State or Federal.

These claims and contentions were again presented in the proceedings on appeal to the Court of Appeals of Maryland from the judgment of the Baltimore City Court, the Court of first instance, in favor of the plaintiff.

The method of raising the federal question was, as stated above, by demurrer to the declaration of the trustee in bankruptcy, challenging the right and power of the trustee under the Bankruptcy Act, and particularly under Section 46 of the Act, to sue the bankrupt for whose estate such trustee was acting, upon a turnover order, and recover a money judgment against the bankrupt. The Baltimore City Court, the Court of first instance, overruled the demurrer, holding that the trustee in bankruptcy did have such power and right to sue the bankrupt for whose estate such trustee was acting and required the defendant in the proceedings petitioner here, to plead to the declaration. In the pleas to the declaration the defendant in the proceedings, petitioner here, again challenged the right and power of the trustee to sue the bankrupt and also contended that a turnover order is not a judgment or decree of the bankruptcy court upon which suit may be brought in a State Court and a money judgment recovered. The Baltimore City Court sustained the plaintiff's demurrers to the defendant's pleas, holding that the trustee had such power and right and that the turnover order could be made the subject of a suit in the State Court.

The Federal Statutes Involved

The primary source of the power given to a Trustee in Bankruptcy to prosecute or defend proceedings at law and in equity is granted by Section 46 of the Bankruptcy Act, as follows:

"Section 46.

"Jurisdiction of United States and State Courts.

"a. The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant."

It is contended by this petitioner that this statute grants to the trustee the power to bring or prosecute *only* those suits which the bankrupt himself might have brought or prosecuted if the bankruptcy proceedings had not been instituted. In other words, the trustee in bankruptcy stands in the place of the bankrupt for the purpose of bringing or prosecuting suits concerning the property acquired or claimed by the trustee and has power to proceed to the same extent as though the bankruptcy proceedings had not been instituted and such controversies were between the bankrupt and such adverse claimants.

The source of title to the property of the bankrupt estate which becomes vested in the trustee in bankruptcy by virtue of his appointment, is derived through the provisions of section 110 of the Bankruptcy Act, as follows:

"Section 110

"Title to property

"a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original peti-

tion proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all

"(1) documents relating to his property;

* * * * * * *

"(4) property transferred by him in fraud of his creditors;

"(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered;

* * * * * * *

"e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomsoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this sub-section e. is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State Court which would have had jurisdiction, if bankruptcy had not intervened and any Court of Bankruptcy shall have concurrent jurisdiction."

To the same and similar effect are sections 96 and 107 of the Bankruptcy Act, which sections give the trustee in bankruptcy the power to avoid preferences given, and liens obtained, or transfers made within four (4) months prior to the adjudication in bankruptcy.

The Bankruptcy Act provides special proceedings against the bankrupt for the recovery of property and assets alleged to be wrongfully withheld by the bankrupt from the trustee. These provisions are set forth in sections 2 and 14 of the Bankruptcy Act.

Reasons Relied Upon for the Allowance of the Writ

As more specifically set forth in the brief attached to this petition, with supporting authorities, it is contended that the decisions of the Federal Courts in construing Section 46 above quoted have held that the provisions of this section relate only to controversies between the trustee in bankruptcy and adverse claimants. There has been no expression in favor of any right of the trustee in bankruptcy to sue the bankrupt for whose estate he is acting as such trustee for the purpose of obtaining a money judgment against him.

In addition to the decision of the Court of Appeals of Maryland, the judgment of which Court this petition requests review, there is one other decision of the District Court of Appeals of California, Second District, Division 2, in the case of *Sampsell* v. *Gittleman*, 130 Pac. (2d) 486,

which has held the trustee in bankruptcy to have such right of action against the bankrupt.

In view of the conflict of decisions in construing section 46, it is respectfully submitted a substantial Federal question is presented.

Also, in addition to the above, but as a part of the same question, is the further question of the character of a turnover order, is it a judgment or decree of the Bankruptcy Court which can be enforced as any other judgment of a court of competent jurisdiction, or does it create by judicial mandate a contractual obligation of the bankrupt to the trustee in bankruptcy upon which suit may be brought, or is it a mere administrative order and failure to comply subjects the bankrupt only to the punishments and penalties provided for in the Bankruptcy Act, that is, contempt or denial of discharge.

Turnover orders are becoming very important, are being applied for very frequently by trustees in bankruptcy, and therefore it is respectfully submitted, the powers of the Bankruptcy Courts, the rights, duties and powers of the trustees in bankruptcy in the matter of turnover orders should be made certain and definite.

It is, therefore, respectfully submitted that the questions herein presented call for the exercise by this Court of its supervisory powers by the granting of a Writ of Certiorari to the Court of Appeals of Maryland, and thereafter reviewing and reversing the decision and judgment of said Court.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER,

Petitioner,

vs.

JACK L. MEDWEDEFF, TRUSTEE, ETC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Decision to be Reviewed

This petition for a writ of certiorari requests the review of the decision and judgment of the Court of Appeals of Maryland, which became final on January 19, 1945. The title of the case is *David Fisher* v. *Jack L. Medwedeff*, Trustee in the matter of David Fisher, individually and trading as Federal Sales Company, bankrupt, and is reported in 40 Atlantic (2nd) 360.

Jurisdiction of the Supreme Court of the United States

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, subsection (b) (Title 28 Sec. 344 of the United States Code annotated).

Likewise a State Court has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States. (Revised Rules of the Supreme Court of the United States, Rule 38, paragraph 5(a).

The Supreme Court of the United States has held that an action brought by a trustee in bankruptcy to recover asserted assets of the bankrupt estate presents a Federal question.

Rector v. *City Deposit and Bank Co.*, 200 U. S. 405, 50 L. Ed. 527, 26 S. Ct. R. 294.

Statement of the Case

The facts and proceedings which resulted in the decision for review have been stated in the petition and this statement is adopted and made part of this brief.

Specification of Errors

The Baltimore City Court, the Court of first instance, and the Court of Appeals of Maryland in affirming the judgment of the lower Court, were in error in holding that the Federal Bankruptcy Act conferred the right and power to a trustee in bankruptcy appointed under the provisions of the Act to sue the bankrupt for whose estate he was such trustee, upon a turnover order of the Bankruptcy Court, directing the bankrupt to turn over to the trustee an amount of money in cash or merchandise, in a State Court and recover a money judgment against the bankrupt.

Likewise the Baltimore City Court and the Court of Appeals of Maryland on appeal were in error in holding that a turnover order of a Bankruptcy Court was a judgment or decree of that Court upon which the trustee in bankruptcy could sue the bankrupt for whose estate he was such trustee, and that the turnover order created a contractual

obligation on the part of the bankrupt to the trustee upon which contractual obligation a suit could be brought and a money judgment recovered.

Argument

The petitioner contends that the primary source of the power granted to a trustee in bankruptcy to prosecute or defend proceedings at law or in equity is found ir Section 46 of the Bankruptcy Act, heretofore quoted in full in the petition on page 9.

This statute grants to the trustee in bankruptcy the power to bring or prosecute *only* those suits which the bankrupt might have brought or prosecuted if the bankruptcy proceedings had not been instituted. In other words, the trustee in bankruptcy stands in the place of the bankrupt for the purpose of bringing or prosecuting suits concerning the property acquired or claimed by the trustee and the trustee has power to proceed to the same extent as though the bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants. Therefore, since it is inconceivable that the bankrupt would sue or proceed against himself, the trustee in bankruptcy has no right or power to sue or proceed against the bankrupt. Sub-section (a) of Section 46 specifically refers to suits by the trustee against third parties who are adverse claimants to the property belonging to the bankrupt estate. Sub-section (b) of Section 46 refers to the Courts in which suit may be brought by the trustee, not with the intent to create any new right of action in the trustee in bankruptcy but that the trustee in bankruptcy shall not bring suit in any jurisdiction by virtue of his appointment by a Federal Court, in which the bankrupt could not have brought suit against any adverse claimant, had not bankruptcy intervened. And, likewise, this section of the Statute is intended to give the trustee the right to

sue in the State Courts instead of being limited to proceeding only in the Federal Court by virtue of the appointment by such Court.

By the provisions of Section 110 of the Bankruptcy Act, the title to all property belonging to the bankrupt or which the bankrupt transferred in fraud of his creditors, is vested by operation of law in the trustee in bankruptcy. The pertinent portions of this section have been quoted in the petition.

By this section the title to all the assets of the bankrupt is, by operation of law, vested in the trustee, and where the bankrupt has made any transfer of his assets or incurred an obligation which would be fradulent as to his creditors, the trustee in bankruptcy, having title thereto, may recover such assets or avoid such obligation or transfer, not against the bankrupt, but against the third parties, as adverse claimants, to whom such property has been so fraudulently transferred or obligation incurred. This requires a proceeding against third parties holding the property or the obligation, in which proceedings the trustee proceeds to recover property to which he holds title, but in no instance would the proceedings be against the bankrupt.

And further, Sections 96 and 107 of the Bankruptcy Act give the trustee in bankruptcy the power to avoid preferences, and liens obtained or transfers made within four months prior to the adjudication in bankruptcy.

It is for the purpose of enforcing these rights against third parties that the power to proceed therefor is granted to the trustee by Sections 46 and 110, and in all such proceedings the defendants are the third parties and not the bankrupt, who is by operation of law divested of all title to his property.

As against the bankrupt special proceedings are available for the recovery of property and assets wrongfully

withheld by the bankrupt from the trustee to which the trustee holds title by operation of law. These special proceedings consist of the power of the Bankruptcy Court to order the bankrupt to turn over any concealed assets or other assets presumed to be in his possession, and failure to comply results in denial of discharge, and, if the trustee can prove that the bankrupt is able to comply with the turnover order but refuses, punishment by fine or imprisonment or both for contempt. If the trustee cannot prove the bankrupt is able to comply, the contempt proceedings must be dismissed. Such was the situation in the present case as is shown by the declaration of the trustee.

Section 2, Bankruptcy Act.
Section 14, Bankruptcy Act.

An exhaustive examination of the decisions of the Courts of the United States fails to reveal any case in which the trustee in bankruptcy sued the bankrupt for whose estate he was acting as such trustee and recovered a money judgment.

Illustrative of cases construing the intent and meaning of Section 46 of the Bankruptcy Act, the following decisions of United States Courts are submitted:

In the case of *Viquesney* v. *Allen*, (C. C. A. 4) 131 Fed. 21, 12 Am. B. 402, it was held that the provisions of clause (a) of Section 46 relate only to controversies between the trustee in bankruptcy and adverse claimants and clause (b) relates only to the suits brought by trustees in bankruptcy, and neither clause authorizes suits by simple contract creditors to set aside fradulent conveyances of the bankrupt.

In the case of *Lehman* v. *Crosby* (D. C.—N. Y.), 99 Fed. 542; 3 Am. B, 662, it was held that the provisions of clause (b) of Section 46, apply only to such actions as the bankrupt himself could have brought before bankruptcy and do

not deprive the District Court of jurisdiction of suit by a trustee to recover the proceeds of an alleged fradulent transfer by the bankrupt.

In the case of *In re. Newfoundland Syndicate* (D. C.—N. J.) 196 Fed. 443, 28 Am. B. 119, it is stated that the limitation of this subsection (b) is upon the Court, and the suit referred to is a proceeding which contemplates the bringing in of a party respondent.

One decision of a State Court apparently holds the same as the Court of Appeals of Maryland and is found in the case of *Sampsell* v. *Gittleman*, 130 Pac. (2d) 486, decided by the District Court of Appeals of California, Section District, Division 2, 1942, and the case herein requested to be reviewed was patterned directly upon the California case.

The petitioner contends that the decisions of both the California and Maryland Courts were predicated upon an erroneous interpretation and construction of Section 46 of the Bankruptcy Act. This is illustrated by the following comparison;

The California Court says and the Maryland Court apparently follows; that by Section 46 of the Bankruptcy Act, the trustee of a bankrupt's estate is authorized to prosecute *any* action in the Court where the bankrupt might have brought an action had there been no proceedings under the Bankruptcy Act. Whereas the Statute states, subsection (b) "Suits by the receiver and the trustee shall be brought or prosecuted only in the Courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant."

It is contended that there is a marked distinction between the right and power of the trustee as the title holder to property, to proceed against the bankrupt to secure the specific property which it is definitely known is in the pos-

session or under the control of the bankrupt, if such right and power exists, which is doubted, and a proceeding at law by the trustee to recover a money judgment against the bankrupt for failure to have on hand and capable of delivery to the trustee an amount of goods which, in the opinion of the referee or the Court, he ought to have on hand. If the latter proceeding were sanctioned, wherever a person became insolvent and could give no satisfactory explanation why he was so insolvent, the trustee in bankruptcy could sue the bankrupt and obtain a money judgment for such deficiency. The decision of the Bankrupt Court in the present case shows that the bankrupt did not have the property and was not able to comply with the turnover order, and it is respectfully submitted the intent of the Bankruptcy Statutes was not to create a cause of action in the trustee in bankrupcy against the bankrupt because there existed a deficiency in assets. It is because there is always a deficiency in assets that bankruptcy occurs, if there were no deficiency in assets, there would be no bankruptcy.

It has been held that a turnover order is not a judgment. *In re Schleisinger,* 102 Fed. 117.

In the case of *Oriel* v. *Russell* (1929) 278 U. S. 358, 73 L. Ed. 419, the bankrupts had been committed for failure to turn over their books of account. In reviewing the case on appeal to this Court, the late Mr. Chief Justice Taft in the course of delivering the opinion stated:

"We find ourselves in general accord on the subject with the remarks of the late Circuit Judge McPherson, who used the following language in the case of Epstein vs. Steinfeld, 206 Fed. 568, reargued in 210 Fed. 236;

" 'In the case at hand the consequence is that as the Order to pay or deliver stands without sufficient reply it remains what it had been from the first, an order presumed

to be right and therefore an order that ought to be enforced. In the pending case or in any other the Court may believe the bankrupt's assertion that he is not in possession or control of the money or the goods, and in that event the civil inquiry is at an end.' "

The opinion then states that if the bankrupt is not believed, he can be restrained of his liberty, actual or virtual imprisonment for debt has ceased, the bankrupt can be imprisoned to compel obedience.

Therefore, in applying the above statement where the Bankrupt Court believed that the bankrupt was not in possession of the goods or the money and could not comply with the turnover order and therefore dismissed the contempt, the civil matter is at an end. And the plain reason that it is at an end is that by judicial decision the bankrupt has not property in his possession the title to which is vested by operation of law in the trustee. A suit in the form of damages for failure to deliver what the referee, the trustee, or even the Court think the bankrupt ought to have in his possession but does not have, would be the creation by the Bankruptcy Act of a right of action which never existed. This is clearly not the intention of the Bankruptcy Act.

The granting of the Writ of Certiorari in this case is respectfully requested.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1160

DAVID FISHER

vs.

JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR REHEARING

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SUPREME COURT OF THE UNITED STATES

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No. 1160

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JACK L. MEDWEDEFF, TRUSTEE IN THE MATTER OF DAVID FISHER, INDIVIDUALLY AND TRADING AS FEDERAL SALES COMPANY, BANKRUPT

PETITION FOR REHEARING

To the Honorable the Supreme Court of the United States:

Your petitioner, David Fisher, respectfully prays that a rehearing be granted him pursuant to Rule 33 of the Rules of this Court, in the above cause, and that the Order of this Court denying the Writ of Certiorari be reconsidered.

Statement

By order of this Court dated May 21, 1945, the petition for Writ of Certiorari was denied on the ground that the petition was not filed within the time limited by Section 8 (a) of the Judiciary Act of February 13, 1925, which requires applications for all writs of error, appeal or writ of certiorari intended to bring any judgment or decree before the

Supreme Court for review shall be made within three months after the entry of the judgment or decree intended to be reviewed.

The record in the present case reveals the following docket entries in the Court of Appeals of Maryland, the decision of which Court was intended to be reviewed:

Appeal from the Baltimore City Court. Filed August 22 1944.

December 20, 1944, Judgment affirmed with costs to appellee. Opinion filed. Op. Capper, Jr.

January 20, 1945. Mandate sent.

This Court in denying the Writ on the ground that the petition therefor was not filed within the time required by the statute, assumed the date of the entry of the judgment to be December 20, 1944.

The Rules of the Court of Appeals of Maryland on the subject of entry of the judgment are as follows:

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"Code, Article 5, Sec. 24

"Section 1. In all cases where judgments shall be reversed or affirmed by the Court of Appeals, and it shall appear to the Court that a new trial ought to be had, such new trial shall be awarded, and a certified copy of the opinion and judgment of the Court of Appeals shall be transmitted forthwith to the Court from which the appeal was taken, to the end that said cause may be again tried as if it had never been tried, and no writ of procedendo, with transcript of record, shall be transmitted, as heretofore practiced.

"Section 2. When an appeal is dismissed or a judgment or decree is affirmed or reversed without being remanded, the Clerk of this Court shall transmit a copy of the docket

entries, under the seal of the Court, to the Court from which the appeal is taken, or writ of error granted, as soon as practicable, not later than thirty days after the case is disposed of by this Court."

"REARGUMENT

"43

"Section 1. No motion for reargument will be entertained unless a petition, distinctly stating the grounds for the same, be filed within thirty days after the opinion of the Court has been delivered; and no reargument will then be allowed unless a majority of the Judges who concurred in the opinion consent to it. An opportunity will be given the opposite party to file a reply to such motion, if any member of the Court who concurred in the opinion requests it before the motion is acted on.

"Section 2. A motion for a reargument shall not prevent the issuance of a fieri facias, or other writ, or otherwise stay the proceedings, unless so ordered by the Court.

"Section 3. No writ shall issue, or other proceedings be taken (excepting remanding the cause) within thirty days from the time the opinion is delivered without leave of the Court."

The above sections of the Rules of the Court of Appeals of Maryland, as far as the petitioner's counsel have been able to determine, have never been the subject of construction, and are the only provisions in the Rules referring to the entry of the judgment or decree of the Court of Appeals of Maryland. It has always been the view of practitioners before the Maryland Bar, that the judgments and decrees of the Court of Appeals of Maryland were not entered until the expiration of thirty days after the filing of the opinion in the case.

The practice in the Court of Appeals of Maryland, which practice prevailed in the case of *Fisher* v. *Medwedeff, Trustee,* that the Court files with the Clerk a typewritten opinion of the Court, concluding with the notation, "Judgment affirmed with costs to appellee", without any formal order or judgment signed by the Court or any Judge thereof. Upon the filing of this opinion with the Clerk, the docket entry is made as appears in the record in this case, "Dec. 20, 1944, Judgment affirmed with costs to appellee. Opinion Filed, Op. Capper, Jr." No further action is taken by the Court or the Clerk until after the expiration of thirty days from the filing of the opinion. If no motion for reargument is filed within this period the Mandate issues, signed by the Clerk, on the thirty-first day. This issuance of the Mandate has always been considered the entry of the judgment or decree of the Court of Appeals of Maryland. In fact, there can be no action taken by the Court from which the appeal was presented until the Mandate from the Court of Appeals is actually received. Another instance indicating that the Mandate is the entry of the judgment of the Court of Appeals of Maryland is in a criminal case; the sentence is not executed until the Mandate is received by the lower Court, and in cases where the sentence of a death penalty is affirmed, the Governor cannot issue the death warrant until the Mandate is received in the lower Court.

These conclusions are further substantiated by the fact that Rule 43 refers to the filing of the "Opinion" as the date from which the thirty day period shall be counted. The filing of the "Opinion" is not referred to as the "judgment" or "decree" of the Court.

Likewise Rule 43 indicates that the filing of the "Opinion" is not the entry of the judgment or decree by enjoining the issue of any writ or other proceedings within the thirty days from the time the "Opinion" is delivered, without leave of the Court. It is only reasonable to conclude that

the statement "a motion for a reargument shall not prevent the issuance of a fieri facias, or other writ, or otherwise stay the proceedings, unless so ordered by the Court" refers only to staying such action after the expiration of the thirty days from the filing of the opinion, otherwise the two section of Rule 43 would be inconsistent.

The reference in Section 1 of Rule 8 that "a certified copy of the opinion and judgment of the Court of Appeals shall be transmitted forthwith to the Court from which the appeal was taken," in order to be consistent with Rule 43 must necessarily refer to the entry of the judgment by the issuance of the mandate, otherwise the two rules would be inconsistent and contrary one to the other.

The petitioner respectfully submits that the facts and circumstances above recited bring this case within the purview of the decision of this Court in the case of *Commissioner of Internal Revenue, petitioner,* vs. *Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor,* No. 710, October Term, 1944, where the facts were practically identical with the facts in the present case. In that case on August 8, 1944, the Circuit Court of Appeals for the Second Circuit filed a document entitled "Opinion"; on the same date the Clerk made a docket entry reading "Order reversed, A. N. Hand, C. J."; on August 29, 1944 a document entitled "Order for Mandate" was filed, and the Mandate issued that day; on November 29, 1944, the petition for writ of certiorari was filed. This Court reviewed the situation thoroughly and concluded that the first document filed on August 8, 1944 was only an opinion of the Court and was not the entry of the judgment. In reaching this conclusion this Court said:

> "* * * We are naturally impressed by the common understanding that in the Circuit Court of Appeals for the Second Circuit the so-called 'Order for Mandate' is deemed the judgment. Robertson and Kirkham,

Jurisdiction of the Supreme Court of the United States (1939) paragraph 384. We have taken and decided as a matter of course a considerable number of cases in which certiorari was sought within three months after entry of the 'Order for Mandate' but not within three months after the 'Opinion'. This practical understanding of the controlling significance, for appellate purposes, of the 'Order for Mandate' is supported and certainly not contradicted by all that is conveyed by the 'Opinion' and 'Order for Mandate' and the Rules of the lower Court.

"It does not detract from the 'Opinion' as an opinion that in its heading it gives as dated 'Argued January 6, 1944 Decided August 8, 1944' and that it concludes with 'The order of the Tax Court is reversed.' The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits judgment orders are separately filed. In spite of its title, the 'Order for Mandate' on its face fulfills the function of such a judgment order. It recites that

'It is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

'It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk,
By A. DANIEL FUSARO,
Deputy Clerk.'

"This language plainly imports that this is the judgment and that it is then being rendered. Nor does the fact that the order was prepared by the Clerk and bears his signature detract from its quality as a judgment. A judgment 'is the act of the court', Ex parte Morgan, 114 U. S. 174, 175, even though a Clerk does

all of the ministerial acts, as here, in conformity with his court's standing instructions.

"The Rules of the court below governing opinions, rehearing, issuance of mandate and stay of mandate are invoked to show that the 'opinion' is the appealable 'Judgment'. These Rules, like other rules, are not phrased with such fastidious precision as to make of all the parts a perfect harmony. But while substantial debating points may be taken, nothing in these Rules contradicts the natural meaning yielded by the terms of the 'Opinion' and the 'Order of Mandate', as reflected in the practice of the Second Circuit and in our own, which treats not the 'opinion' but the 'Order of Mandate', as the order of judgment. The Rules would have to be far less artistic than they are to warrant us in holding that the Circuit Court of Appeals has consistently misinterpreted some of its own rules. Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question of the bar practicing before it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court.

"But now that the existing practice has revealed abstract disharmonies, if not difficulties, the Circuit Court of Appeals will doubtless establish a more tidy system for meeting the technical requirements for review here. The normal time for entering a judgment, as the starting point for determining whether review will be sought or whether there has been acquiescence in a judgment, should be fixed. The uncertainties inherent in litigation should not be needlessly prolonged. The entry of the 'Order for Mandate', which in the Second Circuit begins the running of the period for appeal, is apparently variable and vagrant. In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccess-

ful litigant to determine whether to seek further review. So long a period ought not to be extended by delay in entering a judgment nor should the burden of securing such entry be put upon the successful litigant. There are bound to be diversities in the modes of rendering and recording judgments of the forty-eight systems of State courts. Uniformity in the entry of judgment among the eleven circuits forming the single federal judicature ought to be capable of achievement without loss to the geographic flexibility of the system."

Approved in *Angelus Milling Co.* v. *Commissioner* No. 610, October Term, 1944.

It has been the common understanding in Maryland, that the issuance of the Mandate by the Clerk of the Court of Appeals of Maryland constituted the entry of the judgment or decree of that Court. Although the Mandate does not contain words in the exact phraseology of the "Order for Mandate", in the proceedings in the Circuit Court of Appeals for the Second Circuit the Mandate of the Court of Appeals of Maryland contains a repetition of the decision of the Court which the Clerk has then entered as the judgment or decree of the Court.

In the proceedings in the case of *Fisher* v. *Medwedeff*, no other order or judgment was entered than the Mandate signed by the Clerk and without this Mandate there would exist no signed order or judgment in the case.

There are cases in which the Court of Appeals of Maryland does sign a formal order. This occurs generally in Appeals from Court of Equity. This order is signed separate and apart from the opinion and is signed a few days in advance of the expiration of the thirty day period and is held by the Clerk until such expiration date. If no motion for reargument is filed, the Clerk files the order, issues the Mandate and attaches a copy of the order to the Mandate. This same procedure occurs also in appeals from

Court of Law where the decision is other than an affirmance or reversal of the judgment of the lower Court.

This practice, it is respectfully submitted, well establishes the commonly accepted rule that the issuance of the Mandate by the Clerk of the Court of Appeals of Maryland constitutes the entry of the judgment or decree of that Court.

Conclusion

It is respectfully submitted that the entry in the docket by the Clerk of the Court of Appeals of Maryland of the filing of the opinion of the Court in the case of *Fisher* v. *Medwedeff, Trustee,* accompanied by the notation of the decision of the Court, was not the entry of the judgment of the Court of Appeals of Maryland in this case, but that the entry of the judgment did not take place until January 20, 1945, when the Mandate was ordered and issued by the Clerk of the Court of Appeals of Maryland.

Respectfully submitted,

LEONARD WEINBERG,
ALLAN ELI COHAN,
J. PAUL SCHMIDT,
Attorneys for Petitioner.

The aforegoing petition has been read by me and I am able to certify that the Rules Nos. 8 and 43 of the Court of Appeals of Maryland, as quoted in the aforegoing petition and the procedure in entering opinions and judgments and decrees of the Court of Appeals of Maryland, are correctly stated therein.

J. C. MARTIN,
Chief Judge,
Court of Appeals of Maryland.

Certificate of Counsel

We, Allan Eli Cohan and J. Paul Schmidt, attorneys for the petitioner, do hereby certify that the within petition is presented in good faith and not for delay.

Dated at Baltimore, Maryland, June 13, 1945.

ALLAN ELI COHAN,
J. PAUL SCHMIDT,
Attorneys for Petitioner.

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